

AUG 5 1940

CHARLES ELMORE CROPLEY
CLERK

Vol 31
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 306 ✓

THE TRAVELERS INSURANCE COMPANY,

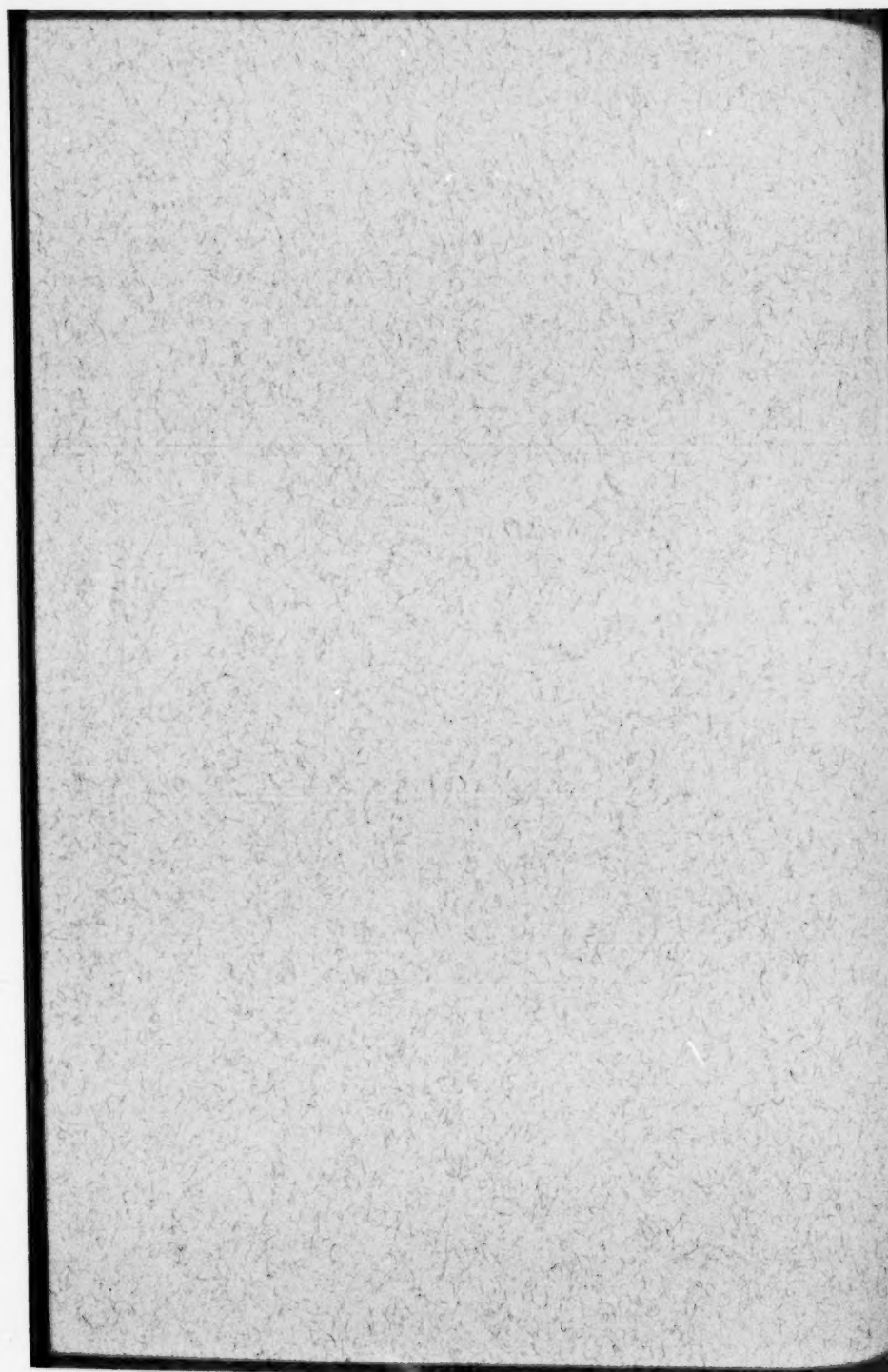
Petitioner,

vs.

EVELYN PRICE ET AL.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FIFTH CIRCUIT.

J. P. JACKSON,
PINKNEY GRISSOM,
Counsel for Petitioner.



INDEX.

SUBJECT INDEX.

	Page
Petition	1
Opinions below	1
Jurisdiction	1
Question presented	2
Statutes involved	2
Statement	2
Specification of errors to be urged	4
Reasons for granting the writ	4
Appendix	12

CITATIONS.

Cases:

<i>Barkley v. Dumke</i> , 99 Tex. 150, 87 S. W. 1147 (Tex. Sup. Ct.)	6
<i>Carroll v. Carroll</i> , 20 Tex. 732, 743	6
<i>Consolidated Underwriters v. Kelley</i> , 15 S. W. (2d) 299 (Tex. Com. App.)	9
<i>Dillon v. Traders & General Ins. Co.</i> , 183 So. 553 (La. Ct. App.)	7
<i>Floyd v. Fidelity Union Casualty Co.</i> , 13 S. W. (2d) 909 (Tex. Civ. App.), 24 S. W. (2d) 363	9
<i>Fort Worth & Rio Grande Ry. Co. v. Robertson</i> , 103 Tex. 504, 121 S. W. 202 (Tex. Sup. Ct.)	9
<i>Franklin Fluorspar Co. v. Bell</i> , 249 Ky. 507, 57 S. W. (2d) 481	7
<i>Freeman v. Fowler P. Co.</i> , 135 Kansas 378, 11 Pac. (2d) 276	7
<i>Gates v. Texas Employers Ins. Assn.</i> , 242 S. W. 249 (Tex. Civ. App.)	5, 6
<i>Great American Indemnity Co. v. Dabney</i> , 128 S. W. (2d) 496 (Tex. Civ. App.)	9
<i>Green v. Green</i> , 235 S. W. 980	10
<i>Holloway v. Texas Employers Ins. Assn.</i> , 40 S. W. (2d) 75 (Tex. Com. App.)	10, 11

	Page
<i>Jones v. Powell Lumber Co.</i> , 156 La. 767, 101 So. 135	7
<i>Kinnard v. Tennessee Chemical Co.</i> , 7 S. W. (2d) 807 (Tenn. Sup. Ct.)	7
<i>Lee v. Lee</i> , 247 S. W. 828 (Tex. Com. App.)	7
<i>Louden v. Industrial Accident Commission</i> , 47 C. R. 143, 286 Pac. 1045	7
<i>MacArthur v. Industrial Accident Commsision</i> , 220 Cal. 142, 29 Pac. (2d) 846	7
<i>Mendez v. Mendez</i> , 277 S. W. 1055 (Tex. Com. App.)	7
<i>Morgan v. Morgan</i> , 21 S. W. 154 (Tex. Civ. App.)	6
<i>New Amsterdam Casualty Co. v. Scott</i> , 54 S. W. (2d) 175 (Tex. Civ. App.)	11
<i>Petroleum Casualty Co. v. Fulton</i> , 63 S. W. (2d) 1068 (Tex. Civ. App.)	10
<i>Pickens v. Pickens</i> , 125 Tex. 410, 83 S. W. (2d) 951	5
<i>Rollins v. Foundation Co.</i> , 154 So. 674 (La. Ct. App.)	7
<i>Routh v. Routh</i> , 57 Tex. 589, 600	6
<i>Sanchez v. Texas Employers Ins. Assn.</i> , 51 S. W. (2d) 818 (Tex. Civ. App.)	7
<i>Scott v. Texas Employers Ins. Assn.</i> , 118 S. W. (2d) 354 (Tex. Civ. App.)	11
<i>Sims v. American Mutual Liability Ins. Co.</i> , 59 Ga. App. 170, 200 S. E. 164	7
<i>Southern Casualty Co. v. Morgan</i> , 12 S. W. (2d) 200 (Tex. Com. App.)	5
<i>Speer's Law of Marital Rights in Texas</i> , Sec. 39, pp. 47 and 48	6
<i>Temescal Rock Co. v. Industrial Accident Commission</i> , 182 Pac. 447, 180 Cal. 637	7
<i>Texas Employers Ins. Assn. v. Boudreaux</i> , 231 S. W. 756, 758 (Tex. Com. App.)	5
<i>Texas Indemnity Co. v. Bailey</i> , 297 S. W. 1042, 1044 (Tex. Civ. App.)	10
<i>Texas Indemnity Co. v. Williamson</i> , 59 S. W. (2d) 232 (Tex. Civ. App.)	10
<i>United States Fidelity & Guaranty Co. v. Henderson</i> , 53 S. W. (2d) 811 (Tex. Civ. App.)	9

INDEX

iii

	Page
<i>Vaughan v. Southwestern Surety Ins. Co.</i> , 109 Tex. 298, 206 S. W. 920 (Tex. Sup. Ct.)	5
<i>Zurich Gen. Accident & Fidelity Co. v. Walker</i> , 35 S. W. (2d) 115 (Tex. Sup. Ct.)	10
Statutes:	
Art. 8306, Sec. 8a, Revised Civil Statutes of Texas	12
Art. 8307, Sec. 4a, Revised Civil Statutes of Texas	12
Art. 2578, Revised Civil Statutes of Texas	13
Art. 2571, Revised Civil Statutes of Texas	13



SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1940

No. 306

THE TRAVELERS INSURANCE COMPANY,
Petitioner,
vs.
EVELYN PRICE ET AL.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FIFTH CIRCUIT.**

Travelers Insurance Company prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Fifth Circuit, entered in the above cause, on May 15, 1940, affirming the judgment of the District Court of the United States for the Northern District of Texas.

Opinions Below.

The opinion of the District Court (R. 46-50) is reported in 25 F. Supp. 894. The opinion of the Circuit Court of Appeals (R. 155-158) is not yet reported.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered on May 15, 1940 (R. 158). A petition for rehear-

ing was denied on June 13, 1940 (R. 166). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

Question Presented.

Where, on the death of a workman, the insurance carrier in good faith pays full compensation under the Texas Workmen's Compensation Laws to the putative wife of such workman with whom he was living at the time of his death, may his legal wife, with whom he had not lived for more than two years prior to his death, also recover full compensation under a claim filed eleven years after his death?

Statutes Involved.

The pertinent Texas Statutes will be found in the Appendix, pp. 12-13, *infra*.

Statement.

This is an action to recover compensation under the Workmen's Compensation Laws of Texas. The facts may be summarized as follows:

The respondent, Mrs. Evelyn Price, was the lawful wife of John J. Ogden, deceased, and lived with him in Colorado until 1923, when he left her to seek work in Texas (R. 47). In Texas about six months later Ogden married a girl, Lottie Self, 18 years of age. Whether he procured a divorce from his former wife before this second marriage does not appear. In any event, the second marriage was in form legal and the girl was in good faith, and ignorant of his prior marital status. He continued to live with her for about two years until his death (R. 46). By her he had two children, one of whom was born shortly after Ogden's death.

While married to Lottie, Ogden secured employment in Dallas. His employer was a subscriber to the Texas Work-

men's Compensation Law, with petitioner, The Travelers Insurance Company, as insurer. In the course of his employment, he was injured and died on November 9, 1926 (R. 23-24). His putative wife filed claim for compensation on behalf of herself and two minor children. This was allowed at the rate of \$10.00 per week for herself and \$10.00 per week for the children, for 360 weeks. Petitioner paid this claim in full without knowledge of facts of his prior marriage (R. 25).

Respondent, the former wife, was notified that Ogden was killed immediately after his death in November, 1926 (R. 25, 106). Upon being notified respondent sent one or two telegrams and about a month later a letter, to members of the decedent's family inquiring about the funeral and the disposition of the body (R. 83-84). She received no reply to these. She made no further inquiry (R. 85, 86). About six months later, in June, 1927, respondent remarried (R. 69). Ten years later, in July, 1937, respondent, while on an automobile trip to Colorado, met members of Ogden's family and then learned that her deceased husband had gone through a marriage ceremony in Texas and that his putative wife had collected some insurance at his death (R. 71-72). She consulted an attorney, and after investigation claim was filed on her behalf with the Industrial Accident Board in Texas on January 14, 1938 (R. 93). This was more than eleven years after Ogden's death.

The Industrial Accident Board ruled that respondent had failed to file her claim for compensation within the statutory period and that she had not shown good reason for failure to so assert her claim. It accordingly denied her claim (R. 13-14).

Respondent thereupon brought this action in the District Court (R. 1). At the trial the District Court denied petitioner's motion for judgment and submitted to the jury the single issue of whether respondent had shown good cause

for her failure to file her claim for compensation within the time prescribed by law. The jury found in respondent's favor and the Court entered judgment for her (R. 43-46).¹ The Circuit Court of Appeals affirmed (R. 158).

Specification of Errors to be Urged.

The Circuit Court of Appeals erred:

1. In holding that a lawful wife may recover full compensation under the Workmen's Compensation Law of Texas, where she was not living with her husband at the time of his death and where full compensation had already in good faith been paid to the decedent's putative wife with whom he was living at the time of his death.
2. In holding that respondent had shown good cause for failing to file her claim within the time specified in the Texas Workmen's Compensation Law.
3. In holding that recovery could be had under the Texas Workmen's Compensation Law under a claim filed more than eleven years after the workman's death and after notice of said death.
4. In affirming the decision of the District Court.

Reasons for Granting the Writ.

The Circuit Court of Appeals has decided an important question of local law in a way in conflict with applicable local decisions.

Under the Texas Workmen's Compensation Law (Section 8a, Article 8306, Revised Civil Statutes of Texas, p. 12 *infra*) compensation is payable to the "wife," minor children and

¹ Respondent also sued on behalf of her two children, but at the close of the evidence petitioner admitted that these children were entitled to recover and the propriety of the judgment in their favor is not here questioned.

other beneficiaries of an injured workman and such compensation is distributed according to the laws of descent and distribution of this State.

Under the Texas Statutes of descent and distribution (Art. 2578, p. 13 *infra*) in the case of community property the wife is entitled to one-half and the children to one-half. Different disposition is made of separate property. See Art. 2571, *infra*.

It is the settled law in Texas that death benefits under the Texas Compensation Law is community property and is to be disposed of as such. Such compensation is in no sense damages for the death, but is payable by virtue of contract between the employer, the employee and the insurer and arising out of the employment contract has the same quality and character as the wages paid under the same employment contract. *Vaughan v. Southwestern Surety Insurance Co.*, 109 Tex. 298, 206 S. W. 920 (Tex. Sup. Ct.); *Southern Casualty Co. v. Morgan*, 12 S. W. (2d) 200 (Tex. Com. App.). "It is measured by the current wages of the deceased, and is to all practical purposes to supply to his beneficiaries the means of support which were afforded by his wages prior to his death. Its payment is provided for from week to week as it accrues except in special cases. The right of the deceased to have compensation paid his beneficiaries was acquired during coverture. His wages flowing from his contract of employment under which he was working at the time of his death were community property. The compensation measured by his community wages, and having its source, as it were, in the same contract of employment, partake more nearly of the nature of community than separate property, and it should be distributed, in our opinion, according to the statute of descent and distribution applicable in distributing community property." *Texas Employers Insurance Assn. v. Boudreaux*, 231 S. W. 756, 758 (Tex. Com. App.). See also *Pickens v. Pickens*, 125 Tex. 410, 83 S. W. (2d) 951; *Gates v.*

Texas Employers Insurance Ass'n., 242 S. W. 249 (Tex. Civ. App.).

It is also settled law in Texas that a putative wife, that is one who marries in good faith without knowledge of existing impediments to her marriage, has the rights and the liabilities of a lawful wife. Her putative marriage removes her disabilities of minority; she becomes of full age; and she may not rescind a conveyance of her separate property regularly made during the putative marriage. *Barkley v. Dumke*, 99 Tex. 150, 87 S. W. 1147 (Tex. Sup. Ct.).

Similarly, with respect to all accumulations during the putative marriage, she possesses all the rights of a legal wife. The Texas courts recognize that as between her and the legal wife she has the better claim to the fruits of her marital partnership with her putative husband, since she, and not the legal wife, in performing her part of the marriage enterprise necessarily contributes to the accumulation of these particular gains. Accordingly, the courts hold that under the laws of descent and distribution the accumulations of a putative marriage are the community property of that marriage; that only the husband's one-half of said accumulations is the community property of the legal marriage; that the putative wife acquires under the statute of descent and distribution one-half of such accumulations and the legal wife only one-half of one-half, or one-fourth, and the children the remaining one-fourth. Thus, in recognition of the prior equitable claims of the putative wife, the courts have constructed a community within a community respecting the fruits of the putative marriage. *Carroll v. Carroll*, 20 Tex. 732, 743; *Routh v. Routh*, 57 Tex. 589, 600; *Morgan v. Morgan*, 21 S. W. 154 (Tex. Civ. App.); *Speer's Law of Marital Rights in Texas*, Section 39, pp. 47 and 48.

In accordance with these principles, it has been spe-

cifically ruled that a putative wife is a "wife" within the meaning of the Texas compensation laws, and as such is entitled to one-half of the death benefits under the Act in question. *Sanchez v. Texas Employers Ins. Ass'n*, 51 S. W. (2d) 818 (Tex. Civ. App.).² This is because under the *Boudreaux* and other cases cited above the compensation has its source in the employment contract and is to be treated in the same manner as wages paid under that contract. This decision is also predicated on the decision of the Supreme Court of Texas in *Mendez v. Mendez*, 277 S. W. 1055 (Tex. Com. App.), where it was held that the word "wife" in the Texas statute defining the beneficiaries in a fraternal insurance policy includes a putative wife for the reason that the statute there, like the one here, was written after our Supreme Court had written many opinions about putative and *de facto* wives, and it was but reasonable to presume that, in view of all such decisions the Legislature would have added the word "lawful" had they intended to exclude putative wives.

In *Lee v. Lee*, 247 S. W. 828 (Tex. Com. App.), the Supreme Court of Texas approved the holding of the Commission of Appeals that a putative wife was entitled to one-half of the benefits payable on the death of an employee under a contract of employment. The court stated

² This is not only the rule in Texas but the rule generally in other states having similar compensation laws. See e. g., *Louisiana*: *Jones v. Powell Lumber Co.*, 156 La. 767, 101 So. 135; *Rollins v. Foundation Co.*, 154 So. 674 (La. Ct. App.); *Dillon v. Traders & General Ins. Co.*, 183 So. 553 (La. Ct. App.). *California*: *Temescal Rock Co. v. Industrial Accident Commission*, 180 Cal. 637, 182 Pac. 447; *MacArthur v. Industrial Accident Commission*, 220 Cal. 142, 29 Pac. (2d) 846; *Louden v. Industrial Accident Commission*, 47 C. R. 143, 286 Pac. 1045. *Kansas*: *Freeman v. Fowler P. Co.*, 135 Kansas 378, 11 Pac. (2d) 76; *Tennessee*: *Kinnard v. Tennessee Chemical Co.*, 7 S. W. (2d) 807 (Tenn. Sup. Ct.); *Georgia*: *Sims v. American Mutual Liability Ins. Co.*, 59 Ga. App. 170, 200 S. E. 164; *Kentucky*: *Franklin Fluorspar Co. v. Bell*, 249 Ky. 507, 57 S. W. (2d) 481.

that the plan of compensation there involved was the same as the plan of compensation provided for in the Workmen's Compensation laws;³ that such benefits were community property and as much the fruit of his labor as his regular wage; and in its strictest sense a "gain" added to the common acquests of the partnership, as the direct result of his labor; and that while he was performing the services which became the consideration of the contract under which the benefit accrued, the putative wife was living with him and performing her part of the marriage enterprise and her services and labor necessarily contributed to the accumulation of this particular gain. See also *Morgan v. Morgan, supra*; *Pickens v. Pickens, supra*; *Texas Employers Ins. Ass'n v. Boudreaux, supra*.

In view of the foregoing decisions, the putative wife in this case was clearly a beneficiary under the act and as such entitled to one-half of the death benefits. Her putative husband's employment occurred after he left his prior wife and during the putative marriage. This employment was the source of the benefits in question, and these partook of the nature of the wages earned in his lifetime, of which the putative wife was clearly entitled to one-half. The other half of the benefits were the community property of the husband and his legal wife and under the statute of descent and distribution the legal wife was entitled to one-half of this one-half or one-fourth of the total,—the children being entitled to the other one-fourth. The court below in holding that the putative wife was not a beneficiary, and in allowing respondent to recover a full one-half of the benefits rather than one-fourth, has clearly departed from the local decisions referred to above.

³ This is also made clear by *Southern Casualty Co. v. Morgan, supra*, where it is held that the Texas Compensation Law is a tri-partite contract between employer, employee and insurer.

The decisions relied on by the court below (R. 156, 49-50) are not in point. *Fort Worth & Rio Grande Ry. Co. v. Robertson*, 103 Tex. 504, 121 S. W. 202 (Tex. Sup. Ct.), was not a compensation case at all, but an action under the Texas death statute, which survives in the "heirs and legal representatives." It was held that the putative wife had no community interest in such cause of action. Later cases make it clear that the compensation laws supersede the injury statutes and benefits thereunder are community property. *Texas Employers v. Boudreaux*, *supra*; *Vaughan v. Southwestern Surety Ins. Co.*, *supra*; *Gates v. Texas Employers Ins. Assn.*, *supra*.

Green v. Green, 235 S. W. 980, a Court of Civil Appeals case, was later overruled by the Supreme Court in *Mendez v. Mendez*, *supra*, and by the later decision of the same Court of Civil Appeals in *Sanchez v. Texas Employers Assn.*, *supra*.

Floyd v. Fidelity Union Casualty Co., 13 S. W. (2d) 909 (Tex. Civ. App.), 24 S. W. (2d) 363, went off on other grounds, any expression contrary to the principles above expressed being *dictum*.

Sanchez v. Texas Employers Assn., *supra*, does not, as the court below suggests (R. 50), support its view, but is contrary thereto.

United States Fidelity & Guaranty Co. v. Henderson, 53 S. W. (2d) 811 (Tex. Civ. App.), merely held that under the evidence therein there was neither a common law nor a putative marriage, and hence the illegitimate children were not entitled to compensation.

Nor is *Consolidated Underwriters v. Kelley*, 15 S. W. (2d) 229 (Tex. Com. App.) in point. The facts there established a common law marriage entitling the wife to compensation.

It is respectfully submitted that the court below has decided a question of local law in conflict with applicable local

decisions. This case is of more than passing interest. The number of cases involving putative wives arising both in Texas and in other states indicates the current importance of the question, justifying review by this Court.

2. The compensation claim in this case was filed more than eleven years after the workman's death. The Texas statute, page 12, *infra*, requires such claims to be filed within six months unless good cause is shown for the delay. The only excuse offered by respondent was that she was ignorant of her rights (R. 68-69, 86). This was clearly insufficient. Ignorance of the law and her rights thereunder is no excuse for failure to comply with the express provisions of the statute. *Zurich General Accident & Fidelity Co. v. Walker*, 35 S. W. (2d) 115 (Tex. Sup. Ct.); *Texas Indemnity Co. v. Bailey*, 297 S. W. 1042, 1044 (Tex. Civ. App.); *Great American Indemnity Co. v. Dabney*, 128 S. W. (2d) 496 (Tex. Civ. App.); *Texas Indemnity Co. v. Williamson*, 59 S. W. (2d) 232 (Tex. Civ. App.); *Petroleum Casualty Co. v. Fulton*, 63 S. W. (2d) 1068 (Tex. Civ. App.).

3. Moreover, after more than eleven years, laches bars the claim. The statute provides that for good cause the Board may, in meritorious cases, waive "strict compliance." The phrase "strict compliance" indicates that *slight* deviations in meritorious cases may be justified, but it is submitted that a delay of eleven years is not within the contemplation of the statute and after such a delay laches bars the claim. The court below admits (R. 156-157) that no case had been called to its attention where there had been such great delay, nor have we found any case where a delay of even two years after notice has been allowed, although there are many cases where delays of less than two years has been held under varying facts not justified. *Zurich, etc., Ins. Co. v. Walker, supra*; *Texas Indemnity Co. v. Williamson, supra*; *Holloway v. Texas Employers Ins. Assn.*,

40 S. W. (2d) (Tex. Com. of App.); *New Amsterdam Casualty Co. v. Scott*, 54 S. W. (2d) (Tex. Civ. App.); *Petroleum Casualty Co. v. Fulton*, *supra*; *Great American Indemnity Co. v. Dabney*, *supra*; *Scott v. Texas Employers Ins. Ass'n.*, 118 S. W. (2d) 354 (Tex. Civ. App.).

It is submitted that in overruling the accident Board and in upholding a delay of eleven years solely on the excuse of ignorance of statutory rights, the court below has not only departed from local law, but has established a harmful precedent of far-reaching importance in the administration of the Texas Workmen's Compensation statutes. Its decision in this regard furnishes additional reason for the exercise by this Court of its power of corrective review.

WHEREFORE, it is respectfully submitted that this petition for a writ of certiorari should be granted.

J. P. JACKSON,

Dallas, Texas;

PINKNEY GRISSOM,

Dallas, Texas,

Attorneys for Petitioner,

The Travelers Insurance Company.

THOMPSON, KNIGHT, HARRIS, WRIGHT & WEISBERG,

Dallas, Texas,

Of Counsel.